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NOTES OF INDIAN CASES.

Sheo Nandan Lal *v.* **Zainalabdin,** I. L. R. 42 C. 849.

The learned judges rightly lay down that the lien under S. 55 (4) (b) of the Transfer of Property Act is not a mere 'personal' right of the seller and can be availed of by a transferee of the amount due. But we cannot help feeling that the judgment does not adequately deal with the questions which seem to arise on the facts of the case. The amount in dispute is said to have been left with the purchaser for payment to a creditor of the vendor. If so, it is at least doubtful whether in such a case the vendor's right against the purchaser who fails to pay the money to the creditor is a claim for unpaid purchase money and the statutory lien covers such a claim also. The judgment under review makes no reference to this question. The decisions in *Abdulla Beary* v. *Mammali Beary* [1] and *Sivasubramanya Mudaliar* v. *Jnanasambanda* [2] negative the existence of the lien in such circumstances. If again, the vendor's remedy against the purchaser is not one for unpaid purchase money but for damages for breach of the contract to pay the creditor, the question may also arise whether a claim of that kind is assignable (See *Gopala Iyer* v. *Ramaswami Sastriyal* [3]) On the answer to these questions will depend the answer to the question of limitation which also seems to have been raised in the case.

Hari Kaishen Bhagat *v.* **Kashi Pershad Singh,** I. L. R. 42 C. 876 (P. C.)

The reference in the course of argument to *Debi Prosad Chowdhury's case* [4] should have drawn their Lordships' attention to the chaotic state of the Indian decisions on the point and it is

1. (1910) 7 M. L. T. 376.
2. (1911) 21 M. L. J. 359.
3. (1911) 22 M. L. J. 207.
4. (1913) I. L. R. 40 C. 721.

much to be regretted that the Board should have contented itself with merely re-affirming the doctrine laid down in *Raj Lukhee Debea's case* [1]. The reference to the rule, as one of stringent equity, does not afford any clue as to the true basis of the legal operation of the consent of reversioners. The decision however makes it clear that an alienee relying on the reversioners' consent to validate the widow's transaction should satisfy the court that the reversioners 'concurred in binding their interests' and not merely that they took some part in the transaction.

East Indian Railway Company *v*. Changai Khan, I. L. R. 42 C. 888.

It is scarcely necessary to say that it is not in the best interests of Justice that a second bench before whom a case may come up for hearing after an interlocutory decision by another bench on a former occasion, should lightly set aside the order of the former bench. It will of course be a different matter if the case comes up by way of appeal from the former order or from a decree passed in pursuance of the former order. Though the former order in the present case is described as one of 'remand'—the word seems to be loosely used in many other similar cases—it seems really to have been one calling for a finding on an issue framed by the High Court. If the order had formally set aside the Lower Court's decision and sent the whole case back to it for disposal, such an order would be conclusive between the parties and cannot be modified except on an appeal against the order of remand. (See S. 105 cl. 2 C.P.C.) Where however the court pronounces an interlocutory decision on certain points and then calls for findings from the Lower Court on certain *other* points, the position is somewhat different. The principles which should guide the court in such cases will be found considered at some length in a recent judgment of the Calcutta High Court. *Hira Lal Pal* v. *Etbar Mandal* [2]. An intermediate situation is presented by the case now under notice. The interlocutory order called for a fresh finding from the Lower Court on what was practically the *sole* point in the case; and the question was whether at the later hearing this order could be ignored as incompetent and the former finding of the Lower Court accepted. The

1. (1869) 13 M.I. A. 209. 2. (1915) 20 C. W. N. 43.

decision on this point in the present case as also in *Haitunnessa Bibi* v. *Kailash* [1], is to a large extent coloured by the fact that the former order was that of a single Judge from which a Letters Patent appeal would have been permissible in the ordinary course and the Division Bench which dealt with the case later practically put itself in the position of an appellate bench to avoid circuity of proceedings. The decisions cannot therefore be safely regarded as of general applicability.

Kedar Nath Mitra *v.* **Dinabandhu Saha**, I. L. R. 42 C. 1043.

There can be no doubt that the conclusion arrived at by the learned Judges in this case is the only one consistent with the business sense of a progressive community. When a cheque is given in payment of a debt, the payee never feels that it is anything less than a payment in money, so long as he has no reason to think that it will be dishonoured and the cheque may pass several hands before it is presented for payment. We therefore see no legitimate reason why it should not be regarded as a part payment for the purpose of the Limitation Act and we do not understand *Mackenzie* v. *Tiruvengadathan* [2], to lay down that the giving of a cheque does not *amount* to a payment. Difficulty was there felt as to the application of the language of the proviso to S. 20; and as to this, we are unable to agree with the observation in the case under notice that it is capable of distinction from the present.' The 9 Madras case held that the cheque does not *evidence* a payment, because it is only an " order for payment." This will apply as much to the drawer of a cheque as to an indorser. The answer to that observation would however seem to be that while a cheque is no doubt an order for payment of *money*, it is *by itself another kind of payment*, for payment need not be in money *alone*; and the drawing or indorsing of the cheque is sufficient evidence, in writing, of that kind of payment. Muthuswami Aiyar and Brandt, JJ. went further and held that according to the proviso, not merely should the fact of payment appear in writing signed by the person paying, etc., but *also the fact that such payment was a part payment.* This, of course, no cheque would of itself show. But with all respect we must say that that view (followed implicitly in

1. (1904) 16 C. L. J. 259. 2. (1886) I. L. R. 9 M. 271.

Ramchunder v. *Chandi Pershad* [1] imports additional words into the section (See *In the matter of Ambrose Summers* [2] *Mandardhar Aitch* v. *Secretary of State for India* [3] *Jada Ankamma* v. *Nadimpallee Rama* [4] *Mukhi* v. *Coverji* [5]) and it must be noted that the Legislature has not, even in 1908, adopted the suggestion of Dr. Stokes that the proviso should be so worded as to make the words 'as such' applicable both to 'part payment' and to interest payment. It is true that before a plaintiff can successfully rely on a payment as saving the bar of limitation in respect of the balance claimed, he must satisfy the court not merely as to the alleged payment, but also that (i) it was on account of the debt sued for and (ii) as part only of what was due (see Darby and Bosanquet Part I Ch. V); but the section does not require that all this must appear in writing or must (as held by Russell, J. in *Ranchordas Tribhowandas* v. *Pestonji Jehangir* [6]) be inferable from the writing, without evidence *aliunde.*

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1. (1897) I. L. R. 19 A 307.
2. (1896) I.L.R. 23 C. 592.
3. (1901) 6 C. W.N. 218.
4. (1883) I.L.R. 6 M. 281.
5. (1896) I.L.R. 23 C. 546.
6. (1907) 9 Bom. L.R. 1329.

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Beasant *v.* **Narayanaiha**: I. L. R. 38 M. 807.

There is an essential distinction between the nature of the jurisdiction exercised by the Court in ordinary suits and that exercised in guardianship proceedings see *Scott* v. *Scott* [1]. Procedure by way of suit is likely to obscure this essential distinction Suit for the recovery whether of a wife or of a child is strongly reminiscent of an order of things which is happily past under which human beings were regarded as chattels. It is never too much to insist on this aspect of the case and their Lordships have done valuable service by holding that remedy by way of suit does not lie concurrently with that given by the Guardians and Wards Act. Once the matter is before the Court under the Guardians and Wards Act, things will be viewed in their proper perspective and we will hear less of the rights of the guardian and more of the interests of the minor and the duties of the guardian. Thanks to the slovenly ways of the Indian Legislature, their Lordships' view is likely to raise some difficulties in practice and one such difficulty has already arisen with reference to obtaining the custody of minors by reason of the unhappy language of S. 25 of the Act. There can be no doubt about the soundness of the policy approved by their Lordships and the legislature may well take note of it and make the necessary modifications.

Krishna Bhoopathi Deo *v.* **Raja of Vizianagaram**: I. L. R. 38 M. 832.

His Majesty in Council is undoubtedly a Court, *Pitts* v. *La Fontaine* [2] and having regard to S. 37, unless there is something repugnant in the context or subject, the expression "Court which passed the decree" would include the Court of the First Instance and as such that Court would have power to recognise a transfer under O. 21 R. 16. Can the provisions of O. 45 R. 15 and 16 be said to make the use of the expression in that sense repugnant to the subject or the context—though it is not put exactly that way—seems to be the only question. Under R. 15, the High Court is given power to give directions; R. 16 provides for appeal. It might be argued that R. 16 was unnecessary if execution of Privy Council decrees was already provided for. But it may be

1. (1913) A. C 417. 2. (1880) I. L. R. 6 A. C. 482.

the result of an imperfect carrying out of the scheme of the new Civil Procedure Code or what is more likely, *ex abundanti cautela*, R. 16 provides for cases where the Privy Council has directed by its order that the execution is to be by some other Court than the Court which passed the original decree. R. 15 is probably a survival without any distinct object or reason.

Ponnusami Padayachi v. Karuppudayan:—I. L. R. 38 M. 843.

Whatever the doubts or difficulties as regards tenants of old waste holding under leases which did not expire before the coming into operation of the Estates Land Act, it seems to be perfectly clear that persons holding under time-expired leases at the time have no defence to an action in ejectment in the Civil Court. "Ryot" is a person who holds for the purpose of agriculture ryoti land on condition of paying rent. A person holding under a time-expired lease at the time of the coming into force of the Act could not be appropriately described as such. Explanation to S. 6 which gives an extended meaning to the term for the purpose of the section seems to be conclusive against the adoption of that meaning for all purposes. This does not mean as Mr. Justice Spencer's judgment would seem to suggest that a tenant can be evicted on any ground not mentioned in S. 153 or 155 by the application of S. 163. This view, we do not think, is warranted by the Act. Subject to the effect of the proviso which we will consider later the conjoint effect of Ss. 153,157 and 187 cl. (g) is that a person who fills the character of a *ryot* at the time of the passing of the Act or at any time subsequently cannot be evicted except on the grounds and in the manner provided by the Act. The argument that a ryot that was but is not, is a trespasser and therefore can be evicted under S. 163 is opposed in the first place to the language of S. 163 which refers only to occupation which from the commencement is wrongful and would also seem to ignore cl. (e) of S. 153 the inclusion of which is justifiable only on the footing that the section is applicable to such people. Again S. 157 which bears on this question, refers to S. 48 which obviously covers cases of time-expired leases. The only way in which effect can be given to the proviso to S. 153 would seem to be by reading S. 157 subject to the legislative declaration in S. 153, that the Act does not affect contracts before the Act respect of non-occupancy ryots in that one matter.

We may justify the conclusion arrived at in the case also from looking at the question from another point of view. There is nothing in the Act to indicate that the right of action vested in the landlord at the date of the Act was intended to be interfered with and applying the principle of *Raja Kumara Venkata Perumal* v. *Ramudu* [1] and *Raja of Pittapur* v. *Gani Venkatasubbarao* [2] the right of the landlord would be saved.

Mr. Justice Miller puts his judgment on the very much broader ground that whenever the tenant is found to have no occupancy right it must be presumed either that the Inamdar had it from the commencement or subsequently acquired it, in either of which cases the land would not be part of an estate. There are many difficulties in accepting this point of view and they have been all pointed out by Sadasiva Aiyar and Seshagiri Aiyar, JJ. in *Venkatasastrulu* v. *Sitaramudu* [3].

Venkatasastrulu *v.* **Sitaramudu,** I. L. R. 38 M. 891.

Unless we adopt some such theory as has found favour with Mr. Justice Sadasiva Aiyar, however inconsistent as pointed out by Mr. Justice Seshagiri Aiyar, with the assumption and even express declarations in various legislative enactments (see land Encroachment Act S 2) cl. S. 3 cl. (2) *d* would be a dead letter for it should be fairly impossible to find a village in which there is no waste land or private land. There is nothing unreasonable in the theory; in fact we should think it best accords with the ancient Hindu notions about the Sovereign's rights in respect of land. The Sovereign had his right to a fixed share but the land belonged to the occupier. The land was not the Sovereign's. The grantee from the Crown, therefore, took only the Sovereign's right *i. e.*, the right to collect the share of the produce in the land. He might assign the uncultivated land to a stranger; he might do that even in his own favour. His rights in respect of waste land were remarkably like that of a person having general power including power to appoint in his own favour. It is very nearly property and yet not property. However proper such a presumption in the case of Saranjams, Jaghirs or even Mokhasas which are in their nature temporary grants there is considerable amount of incongruity in applying it to grants like Agraharam, and Devadayam or other similar grants. By

1. (1913) 28 M. L. . 81. 2 (1915) 29 M. L. J. 1.
3. (1914) 26 M. L. J. 535

such grants, revenue ceases to have the character of revenue with no chance of reversion to its original character. In the case of Zemindaries, such a presumption is inconsistent with the terms of the Regulation XXI of 1802. The proper presumption would rather seem to be the grant of the melwaram in the case of occupied lands and a grant of both the land and the revenue to the grantee in the case of waste lands. Mr. Justice Seshagiri Aiyar has applied this theory but we must confess we are not convinced that he has succeeded in making the clause intelligible on that basis.

Periya Aiyar Ambalam *v.* **Shumunga Sundaram**, I. L. R 38 M. 903.

Although one cannot help remarking that *Cholomondely* v. *Clinton* [1] has been unduly pressed into service this case has done somewhat to clear the air by defining the conditions under which adverse possession can be found against the mortgagor. Their Lordships would have helped in saving considerable litigation if they had clearly defined what the remedies of the mortgagor under those circumstances would be. In fact, decision on the question of adverse possession against the mortgagor must be necessarily incomplete without an investigation into the means open to the mortgagor to prevent such adverse possession. The order of reference raised another interesting question as to limitation in the case of suits for declaration whether each distinct denial gives rise to a fresh cause of action or whether there is a cause of action once for all on the first denial and a suit brought more than six years thereafter though within six years of another distinct denial is barred. There is considerable difference of opinion on this point. For instance there might first be a verbal denial of title; then a denial involved in a sale deed. There might first be an attachment, then a sale. Do these give rise to different causes of action? or is there in each case, only one cause of action?

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Tribhovandas *v.* **Abdul Ally,** I. L. R. 39 B. 568.

The learned Judge appears to us to have expressed himself too generally when he says that in the circumstances of the case no cause of action survived against the insolvent and that the suit against him ought to be dismissed at once and an *ex parte* decree passed against the estate in the hands of the Official Assignee. It is true that after the vesting order, all the property of the insolvent vests in the Official Assignee, but that does not *ipso facto* put an end to the insolvent's relation to the cause of action on which pending suits against him rest. It is noteworthy that while O. 22 R. 8 provides for the insolvency of a 'plaintiff,' there is no corresponding provision applicable to cases in which the insolvent is a *defendant*. The only rule covering this is O. 22, R. 10 under which it has been held that the Official Assignee can be made a party defendant only in certain classes of suits *i. e.*, where there is a devolution on him of the subject-matter of the suit (see *Miller* v. *Budh Singh* [1] *Punithavelu* v. *Bhashyam Iyengar* [2] *C. E. Grey Official Assignee* v. *Haziri Lal* [3].) Under the law as it stood in 1864 there was not even such a provision and hence Sir Joseph Arnold and his colleagues held that the Assignee has 'no power whatsoever of continuing to defend (an action) in substitution of the insolvent, far less any power of getting himself added as co-defendant together with the insolvent.' *In re Hunt Monnet & Co.* [4]. Even under O. 22, R. 10 C. P. C. it would seem open to the plaintiff to continue the suit against the original defendant alone, in spite of the insolvency, though a decree thus obtained may not bind the estate in the hands of the Official Assignee *Punithavelu* v. *Bhashyam Iyengar* [2]. If however the Assignee is brought on the record under O. 22, R. 10 (whether by the plaintiff or on his own application) the question then arises whether the suit is to be continued *only* against the Assignee or against the original defendant also.

The corresponding rule in Act XIV of 1882 (S. 372) provided for the suit being continued against the Assignee 'either in addition to or in substitution for' the original defendant as the case may require. This qualification has been omitted in the Code of 1908 and the rule now runs substantially

1. (1890) I. L. R. 18 C. 48.
2. (1901) I. L. R. 25 M. 406.
3. (1907) I. L. R. 30 A. 486.
4. (1864) 1 B. H. C. R. 251.

in the same terms as O. 17, R. 3 of the English Supreme Court Rules (except for the requirement of the leave of the Court). Under the English practice, it would seem, that where the suit relates to property which has devolved on the Assignee and the result of the action is not likely to affect the insolvent personally, the Assignee alone is allowed to continue the defence of the suit; and this is probably what led the learned Judge to hold that the suit cannot any longer proceed against the insolvent defendant. But we are not by any means sure whether the language of O. 22 R. 10 (even when taken with S. 146 of the new Code) would enable the Assignee to take steps to set aside an *ex parte* decree passed against the insolvent before his insolvency; and if in spite of the supervening insolvency, the original defendant is to be recognised as having a sufficient *locus standi* to apply to get the *ex parte* decree set aside, we do not see why he cannot be allowed to continue to defend the suit, after the *ex parte* decree is set aside, at any rate when the Official Assignee, for whatever reason it may be, declines to defend the suit. The insolvent is certainly interested in reducing his liabilities as far as possible and protecting his assets, so that he may have the benefit of any surplus that may remain after payment to his creditors and it will not therefore be right to say that after his insolvency he has no interest in any litigation that may concern his property.

Secretary of State for India *v.* **Bapuji Mahadeo,** I. L. R. 39 B. 572.

Whether it would not have been more graceful on the part of Government not to set up the defence of limitation in answer to the plaintiff's claim is another matter; but we cannot help feeling that the present is an instance of a hard case inducing a court to lay down doubtful law. We find it difficult to see how, on the facts appearing in the report, the moneys sued for could be held to have become vested either in the Native Ruler or later on, in the East India Company 'in trust for a specific purpose' as understood in connection with S. 10 of the Limitation Act. The view taken by the learned Judges is certainly at variance with the opinions expressed by the majority in *The Secretary of State for India* v. *Guru Proshad Dhur* [1]. The fact that on several occasions the officers of Government expressed themselves ready to

1. (1892) I. L. R. 20 C. 51 (F. B.)

pay over the amount to the persons entitled won't make them 'trustees' in respect thereof. Acts 25 of 1866 and 5 of 1870 throw no light on the question of limitation. As for *Scott* v. *Bentley* [1], the Vice-Chancellor no doubt describes the admission there as amounting to 'a declaration of trust' but the question before him related only to the jurisdiction of the Court of Equity to deal with the case and for that purpose, it was immaterial whether it was an 'express' trust or only a 'constructive' trust.

Suleman Haji Usman *v.* Sheikh Ismail I. L. R. 39 B. 580.

We quite agree that before granting a certificate under S. 92 C. P. C. the Collector or Advocate-General must be satisfied that there is a *prima facie* case for resort to Court; but it seems to us going too far to hold that a doubt felt by the sanctioning officer, as to whether the institution in question is a private institution or a public trust, will invalidate the consent given by him for the institution of the suit, however much he may be convinced as to the necessity for the suit on the merits. The public or private character of religious or charitable institutions is sometimes a nice question and if the Collector or Advocate-General is to be held precluded from sanctioning a suit in respect of an institution, because of his doubts on this point, there will be no means of redress in such a case, for the decision of the Court on the point cannot be invoked except in a suit instituted with such consent. Whether the view taken in *Sagedur Raja* v. *Gour Mohun* [2] that the defect in the certificate in that case only amounted to an 'irregularity' is to be unreservedly accepted or not, it seems to us needless technicality to hold that even when the sanctioning officer has fully applied his mind to the case, his certificate is useless if he is not able to come to a definite conclusion on the *legal* questions involved in S. 92 or is candid enough to indicate his doubts in the certificate.

Parvati Bai *v.* Bhagwant, I. L. R. 39 B. 593.

It seems to be the necessary result of the observations of the Judicial Committee in *Lakshman Dada Naik's Case* [3] that a man cannot by testamentary acts exercise the same powers over joint property as he could by acts *inter vivos*; and in the absence of

1. (1855) 1 K. and J. 281. 2. (1897) I. L. R. 24 C. 418.
3. (1880) I. L. R. 5 B. 48.

testamentary *power*, the *object* of the disposition is immaterial. Reference may be made in this connection to observations to the same effect in *Lakshmi* v. *Subramanya* [1] and *Totempudi Venkataratnam* v. *T. Seshamma* [2].

The Municipality of Ratnagiri *v.* **Vasudeo Balakrishna,** I. L. R. 39 B. 600.

We venture to doubt the correctness of this decision. The plaintiff claimed damages from the Municipality for wrongful dismissal from office, *viz.* on the footing of breach of 'contract', and the judgment does not even refer to cases like *Mayandi* v. *McQuhae* [3] *The President Dt. Board, Malabar* v. *Kantikandram* [4] and *the Municipality of Faizpur* v. *Manak Dulah Shet* [5] which hold that such claims are not covered by the short period of limitation provided in respect of suits for damages for alleged *excess of statutory powers.* On the facts of the case there seems to arise another question to which again we find no reference in the judgment. The order of dismissal was first made on 10-11-1910, but this seems to have been done without hearing the plaintiff and in contravention of an express rule which directed that he should be heard in defence. When this was pointed out to the Municipality, it seems to have given the plaintiff an opportunity for explanation and this, we think, may reasonably be said to have taken away the effect of the previous *ex parte* order so as to give the plaintiff a fresh starting point on the date of the subsequent order passed after hearing the explanation—in which view, the suit was within 6 months of the dismissal. It would be unfortunate if the plaintiff should, in order to escape the bar of limitation, be obliged to rush into court even when the Municipality recognised the mistake in its procedure and expressed itself willing to deal with the matter in due course. The fact that *in form* the final order purports to be not a substantive order of dismissal by itself but merely a re-affirmation of the former order should not be allowed to make any difference in respect of legal consequences.

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1. (1889) I. R. 12 M 490.
2. (1903) I. L. R. 27 M. 228.
3. (1878) I. L. R. 2 M. 124.
4. (1906) 17 M. L. J. 390.
5. (1897) I. L. R. 22 B. 637.

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Prem Nath Tiwari *v.* **Chatarpal Man Tiwari,** I. L. R. 37 A. 638.

In this case, the same view is taken as in *Ramana Reddi* v. *Babu Reddi* [3] *viz.*, that minority is not a ground of exemption from the bar provided by S. 48 Civil Procedure Code. This is by reason of the reference in S. 7 of the Limitation Act to the schedule and does not as pointed out by Mr. Justice Sadasiva Aiyar in *Kumara Venkata Perumal* v. *Velaguda Reddi* [4], involve the exclusion of the other general provisions of the Act.

Qasim Beg *v.* **Mahammad Zia Beg,** I. L. R. 37 A. 640.

No doubt, it is one thing, as Mr. Justice Piggot points out, to say that notwithstanding a colorable deed of sale, a suit for possession may be maintained within 12 years and quite another thing to say that a declaration as to its invalidity may be had though more than 3 years have elapsed from the date of its execution. This is made perfectly clear by the succeeding article (Art. 92). There could be no pretence that under any circumstances, a forged deed could be the foundation of any right; nevertheless that Article provides only 3 years for a suit for declaration that it is forged, thus indicating that actions in respect of deeds are intended to be brought early though framed as suits for declaration. But article 91 being worded as it is, and in the view of our High Court the addition of a prayer as to cancellation not being compulsory under S. 42 of the Specific Relief Act, it is difficult to see on what legal ground the court can reject the plaint as barred by limitation, if the suit is within 6 years of hostile assertion of title under the deed. This is the view taken in *Nagathal* v. *Ponnusami* [1]. When there is a claim for cancellation, then no doubt Article 91 would apply and then the question would arise whether as held in *Singarappa* v. *Talari Sanjivappa* [2], the existence of circumstances giving rise to reasonable apprehension of injury is not one of the "facts entitling the plaintiff to sue". To say that S. 39 of the Specific Relief Act is subject to the limitation provided in the Limitation Act would seem to be arguing in a circle. The question as to what facts constitute reasonable apprehension is a question of fact in each case.

1. (188') I. L R. 13 M. 44. 2. (1904) I. L.R 28 M. 349=15 M. L. J. 228.
3. (1912) I. L.R. 37 M. 186=24 M. L. J. 96. 4. (1914) 27 M. L. J. 25.

Abdul Hakim *v.* **Karan Singh,** I. L. R. 37 A. 646.

Although the point is by no means clear, we do not think that the view of the learned Judges in this case is right. In the first place the claim for the rescission of the usufructuary mortgage and the claim for damages in respect of the breach of the covenant forming consideration therefor are not we think in respect of the same cause of action. Secondly, O. 2, R. 2 refers only to cases where a party while entitled to more than one relief sues only for one of such reliefs and not to cases where he is entitled to only one relief but sues for another. We do not think that the fact that "a party knew perfectly well what relief he was entitled to and he deliberately omitted to claim the right relief" mattered, seeing that the question was one of pure law.

Kundan Lal *v.* **Jagannath,** I. L. R. 37 A. 649.

This case questions the assumption generally made (see *Kripasindu Sahu* v. *Raja of Kalikota* [1]) that as regards the creditor's right of appropriation, there is no difference between the English Law as laid down in the *Mecca case* [2] and the Indian Law as enacted in S. 60 of the Contract Act. The learned Judges hold that the Indian Contract Act embodies the rule of Civil Law which required the creditor to exercise his option within a reasonable time of the payment. We must confess we see little warrant for this in the section. The section does not either expressly or by necessary implication impose any such limitation as to time. Though it is true that the rule as understood in England is likely to reduce the practical necessity for a rule like that in S. 61 to a minimum, it can by no means be said that there would be no occasion for the application of the rule. Not to speak of cases where parties fail out of sheer ignorance to exercise the option, there must be a large number of cases of persons under disability without any person empowered to exercise the option so as to bind them. The rule of English law is in fact not stated differently.

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1. (1915) 29 I. C. 718.
2. (1897) A. C. 286, 293.

CRITICAL NOTE.

[**Brijnandan Singh** *v.* **Bidyaprasad Singh**, I. L. R. 42 C. 1068 (F. B).]

In spite of the logical weaknesses of the rule and of even occasional dissents from it, it must now be taken as settled law, in all the High Courts, that under the Mitakshara, a mortgage of joint family property by the father is binding in respect of the sons' interests therein *only* if it was made (or believed to have been made) in connection with an 'antecedent debt' or for family necessity. But this rule gives rise to certain anomalous situations when worked with the other well-established rule that as a 'debt,' the transaction is nevertheless binding on the sons (to the extent of the family property) unless incurred for illegal or immoral purposes. A father mortgages family property (under circumstances which do not make the mortgage binding *as such* against the sons) and dies: What is the mortgagee's remedy and what is the rule of limitation governing it?

In the case under notice, the Full Bench have dealt with these questions not on the merits but from a much narrower point of view, *viz.*, whether the earlier Full Bench decision in *Luchman Doss* v. *Giridhar Chowdhury* [1] has in effect been overruled by the later decisions of the Judicial Committee or superseded by subsequent legislation; and they hold that it has not been so overruled or superseded. On the question of limitation, the learned Judges content themselves with laying down that Art. 120 and not Art. 132 will apply to the mortgagee's suit, but they found it unnecessary to decide when time would commence to run in such a case, for the purpose of Art. 120. Even in *Luchman Doss's case* no reasons are given, the opinion of the Full Bench being delivered in the form of a set of categorical answers. So far as other Provinces are concerned, these decisions are not *in themselves* binding and the points above raised, being of general importance, deserve a fuller and freer discussion.

To arrive at the correct answer to these questions, it is necessary to see how the law stands in respect of an action by the mortgagee *during the father's lifetime.* In so far as *Luchman Doss's case* laid down broadly that the mortgagee, purchasing in execution of a decree obtained against the father *alone*, will not be entitled to the sons' shares, it can no longer be accepted as good

1. (1880) I. L. R. 5 C. 855.

law, in view of the decision of the Judicial Committee in *Bhagbut Pershad Singh* v. *Girja Koer* [1]. See also *Nanomi Babuasin's case* [2]. Whether the creditor seeks to enforce a mortgage claim or a mere money claim, he is not, apart from the provisions of S. 85 of the Transfer of Property Act (now, O. 34, R. 1, C. P. C.) *bound* to implead the sons on pain of being necessarily unable to bind their interests otherwise. If the mortgagee sues the father alone within 12 years (under Art. 132) he can effectually sell the *whole* interest of the family in the mortgaged property, though the personal remedy (under O. 34, R. 6, C.P.C.) be barred because of the lapse of 6 years under Art. 116. If the sons should *afterwards* question the execution sale, they can succeed, not on the ground that the suit was not instituted within 6 years—the mortgage being *ex hypothesi* not binding upon them *qua* mortgage—but only by showing that the debt, *even as a debt* was not binding upon them. Why then should it make any difference, if the sons are impleaded along with the father?

It is pointed out in several cases that the *onus* of proof, as to the binding character of the transaction, will differ according as the action is one *by the mortgagee* to enforce the mortgage or *by the sons* to recover property lost to the family in execution of the decree against the father (see *Kishen Pershad Chowdhury* v. *Tipan Pershad Singh* [3], *Chandra Deo Singh* v. *Mata Prasad* [4].) But even accepting this, why should any difference arise, on the question of *limitation*. The sons are impleaded in the mortgagee's suit, not because their shares cannot be sold in their absence, but because they are persons interested in the property (within the meaning of O. 34, R. 1, C. P. C), or because the creditor does not desire that any objections on the score of the character of the debt (on whomsoever the *onus* may lie) should be left to lie over for a future occasion. It seems reasonable to say that 'relief' is asked for only as against the father—the sons' rights being affected only through him—and the question of limitation has therefore to be decided only with reference to him Cf. *Biswanath* v. *Jagdip Narain* [5].

Of course, if on the principle of the prohibition of *voluntary* alienation of an *undivided* share (obtaining in some provinces) the mortgage is to be held either valid

1. (1888) I. L. R. 15 C. 717.
2. (1885) I. L. R. 13 C. 21.
3. (1907) I. L. R. 34 C. 735.
4. (1909) I. L. R. 31 A. 176.
5. (1912) I. L. R. 40 C. at pp. 353, 4.

as a whole or *bad in toto* (*i.e.*, even as regards the father's share), the action cannot succeed as a mortgage action *to any extent*, *i.e.*, even as against the father and the *whole* suit will then be governed by the six years' rule (see per Stanley, C. J. in *Chandra Deo Singh's case* [1]). But, curiously enough, this is not the view taken in Calcutta. That Court seems to allow a mortgage decree in such cases, so far as the father's share is concerned, even when the action is brought after the father's death (see *Kishen Pershad* v. *Tipan Pershad* [2]). If, so far as the father is concerned, the action is allowed to be a 'mortgage action', it would seem to follow that the 12 years' rule would apply to the *whole* action and not merely in respect of the relief to the extent of the father's share. Can it reasonably be contended that even as between the mortgagor and the mortgagee, the mortgagor can plead that the transaction is good only to the extent of his share or that the sons' shares in the mortgaged property can in such cases be made available to the creditor only in enforcement of the *personal* remedy (under O. 34, R. 6) against the mortgagor? Further is it not the right view, that so long as the father's liability is subsisting (whether enforceable under Art. 116 or Art. 132) the creditor's right against the sons subsists too? Does not a "mortgage decree" against the father itself constitute a 'judgment debt' enforceable against the sons, on the principle of the decision in *Periasami Mudaliar* v. *Seetharam* [3]. And if the sons' interest in the family property can be reached by a suit on such 'judgment debt,' it is certainly odd that it should be impossible of being reached by the original action itself.

What then is the effect of the father's death on the creditor's remedy? The *substantive rights*, of parties undergo no change thereby. As observed in *Ramayya* v. *Venkatrathnam* [4] 'the obligation devolves on the son in the condition in which it would be enforceable against the father if he had been still alive.' Is there then any reason for holding that the law of limitation works differently according as the mortgagee institutes his suit during the father's lifetime or after his death? Whatever might have been the position prior to 1908, S. 52 of the New Code seems to us to place the matter fairly beyond doubt. If, as above submitted, the whole property could have been made liable the moment before the father's death—in spite of the lapse of 6 years—the

1. (1909) I. L. R. 31 A. 176.
2. (1907) I. L. R. 34 C. 735.
3. (1902) I. L. R. 27 M. 243.
4. (1893) I. L. R. 17 M. 122.

sons' position in respect of those properties, after the father's death, is declared to be that of 'legal representatives' and the suit against them will therefore be governed by the same rule of limitation as would have applied to the suit had it been brought against the father himself. If, again, in spite of the father's death, the creditor can obtain a mortgage decree to some extent, the reasons above adduced would equally apply here so as to make the *whole* action governed by Art. 132 and not by Art. 120 or Art. 116. Whether the action is brought during the father's lifetime or after his death, it is not one to enforce any 'independent liability' of the sons or one based on 'any cause of action' arising out of *their* acts. It is always one to enforce their father's liability, though directed against property that otherwise would have gone to them, and there is no valid reason for applying at any time a separate rule of limitation so far as the sons are concerned (Cf. *Beck* v. *Pierce* [1], referred to in *Periasami* v. *Seetharama* [2]). If the father's liability has ceased to be enforceable (for instance under Art. 115) the son's comes to an end too, though the period allowed by Art. 120 may not have elapsed, *Abhoyi* v. *Pomanion Ammal* [3]; if that liability is kept up, by acknowledgment or part payment or by judgment, the son's liability continues to subsist too, though he may not be a party to any of those acts. What then is the object or significance of bringing in Art. 120 so far as the sons are concerned, if its operation is to be always controlled by considerations as to the continuance or cessation of the father's liability?

We are not aware of any case in which *two* different articles have been applied against the father and the sons respectively, in an action brought *during the father's lifetime.* Such a course was, so far as we have been able to see, first adopted in *Surja Prasad* v. *Golab Chand* [4], in which the action was instituted *after the father's death.* The same was the case in *Chandra Deo Singh* v. *Mata Prasad* [5]. *In Maheswar Dutt* v. *Kishen Singh* [6]. Brett and Sharfudin, JJ. applied the 12 years' rule in respect of the whole claim, the suit being brought after the father's death; and in *Kishen Pershad Chowdhury's case* [7] Mookerjee and Holmwood, JJ. left the question of limitation open, the suit there

1. (1899) L. R. 23 Q. B. D 316.
2. (1903) I. L. R. 27 M. 243.
3. (1900) 10 M. L. J. 248
4. (1900) I. L. R 27 C. 762.
5. (1909) I. L. R. 31 A. 176.
6. (1907) I. L. R 24 C. 184.
7. (1907) I. L. R. 34 C. 735.

having been brought within 6 years, though the father was dead at the time. The decision of Coxe and N. R. Chatterjea, JJ. in *Sheo Narain Roy* v. *Mokshoda Das Mitra* [1] adds little by way of reasoning.

The question has not, so far as we are aware, been dealt with in the present form in any reported decision in Madras or Bombay. The view taken in the earlier Madras case, that Art. 120 would apply to the remedy as against the sons or that the father's death furnished the starting point for limitation, (see *Natesayyan* v. *Ponnusami* [2]) has been overruled by the decisions in *Mallesam Naidu* v. *Jugala Panda* [3] and *Periasami Mudaliar* v. *Seetharama* [4] We may point out, in passing, that the ruling in the last mentioned case, as to the maintainability of a suit on the Judgment, has now ceased to be operative, by reason of the change introduced by S. 52 of the new Code; for as pointed out by Justice Bhashyam Iyengar himself (in the course of the argument in that case), if the decree against the father could be *executed* against the family property in the sons' hands, a *suit on the basis of that decree* would be barred by S. 47, C. P. C. But the principle there laid down that the same rule of limitation will govern the remedy both against the father and against the son goes a long way to support the views herein submitted.

If the father's death affords no basis for starting the sons' liability afresh, it is equally difficult to find any principle on which it can be held that a right to proceed against the sons accrues from the time when the proceeds realised by sale of the father's share are found insufficient to discharge the debt.

It only remains to add that it would not follow from the views above submitted that there will cease to exist 'any distinction between a case in which a Hindu son is sued on the basis of his pious obligation to pay his father's debts and a case in which a mortgagee of the father seeks to enforce a mortgage against the son by sale of the mortgaged property' (per Stanley, C. J. in *Chandra Deo Singh's case* [5]). The son's right to alienate his undivided share or to become divided from the father (where there is no question of fraud, etc.) will prevail as against a simple contract

1. (1913) 17 C. W. N. 1022. 2. (1892) I. L. R. 16 M. 99
3. (1899) I. L. R. 23 M. 292 (F. B.) 4. (1903) I. L. R. 27 M. 243 (F.B.)
5. (1909) I. L. R. 31 A. at p. 194.

liability of the father or the liability arising under a mortgage not made for a binding purpose but not as against a valid mortgage created by the father.

NOTES OF INDIAN CASES.

Muthu Ramakrishna Naiken v. Marimuthu Goundan :—I. L. R. 38 M. 1036.

This case raised a very interesting point of Hindu Law but we do not think it has been adequately dealt with. Once it is granted that the property is the joint property of the husband and the wife, the conclusion, no doubt, should follow, having regard to the supreme authority conceded to the Mitakshara in Southern India that the property quoad her share is stridhana. As regards the saying of Manu that a wife, a son and a slave have no property and that the property acquired by them belongs to the person to whom they belong, Vijnaneswara is clear that it does not lay down that a wife cannot own property. According to him, it only indicates her dependence. (Commentary on Yajnavalkya Vyavaharadhyaya verse 49; Gharpure's translation p. 75). Subject to the right of the husband to use them in time of distress or for maintenance all kinds of property acquired by married women are their stridhana. Apparently, the husband is not bound to return the amounts taken by him if he had no property of his own at the time. Is only this analogy to be applied to the services rendered by the wife to the husband when those services lead to the acquisition of wealth and the husband's right of user in the wife's share in the acquisition limited to occasions of necessity such as are indicated above? Under the Hindu Law, though the general rule is that the husband is not bound to pay the debts of the wife, where however, his maintenance is dependent upon the wife's exertions, as in the case of washermen, cowherds and actors, he is bound to pay them. It is also recognised by most of the text writers that the husband has got greater control on this species of acquisition than others (Smriti Chandrika Chap. XI-16. Vyavahara Madhava S. 94) while Viramitrodaya (Chap. V-2) and Vivada Ratnakara (Chap. XV) would seem to place acquisitions by mechanical arts out of the category of stridhana on the strength of the text of Manu above referred to. The author of Viramitrodaya does not consider that such acquisitions come within Devala's text. He seems to restrict "gains" in his text to gifts. Whatever

the nature of the sole acquisitions of the wife by mechanical arts, it is certainly incongruous to consider acquisitions by the husband with the aid of his wife to belong to both because that is possible only on the supposition that the wife rendered her services with the idea of getting *quid pro quo*. If the proper presumption in the case of joint acquisitions by members of an undivided family is that the property belongs to them as *joint family property*, the proper presumption to make in the case of joint acquisition by husband and wife is that they intended to hold the property in the manner in which a husband and wife hold property under the Hindu Law—namely with a right of user ordinarily and an inchoate ownership in the wife to mature under certain circumstances to maintenance, in others to ownership in whole or in part. *Lakshman Ramachandra* v. *Satyabhama Bai* [1]. It is not certain that the proper presumption to make even in the case of other female members of the family is not similar *Seshayya* v. *Narasamma* [2]. The very position that the widows of the family can participate in the improvement of the family condition which may partly be due to the exertions of the male members of the family and that by acquiescence in the dealings by the male members might have their claims postponed to the claims of creditors, would seem to require an assumption like the one we suggest. It is the duty of the wife to serve the husband and that the husband can forbid the wife from acquiring property by serving others does not seem to admit of doubt. Under the circumstances, the proper presumption to make is, we think, that the services were rendered gratuitously and with no intention of getting any return for them. Under the English Law, when the income of the wife's property goes into the hands of the husband with her knowledge, courts readily draw the inference that a gift of the same was intended by the wife. Whether there should be such a presumption in the case of wife's money here in India or not (Vijnaneswara seems to cast a duty on the husband, in ordinary circumstances, to return the money) there must be a presumption in the case of services that they were gratuitously rendered. Of course the question would be different if the husband recognised her right by either putting her forward as a partner in the trade or purchasing property in her name. This latter circumstance appears to have existed in this case and might justify the actual decision.

1. (1877) I. L. R. 2 B 494, 507. 2 (1899) I. L. R. 22 M. 357.

Kesar Kunwar v. Kashi Ram : I. L. R. 37 A. 634.

The decision in this case seems to be colored to a large extent by the view taken by the Allahabad High Court that each mortgage furnishes a separate and independent cause of action whether the suit is one for redemption or for sale. Our High Court while conceding that for purposes of sale, the causes of action are separate, would seem to consider it obligatory on the mortgagor to redeem all the mortgages on the land in favour of the mortgagee if the latter should so insist. In the former view, the claim of the mortgagee on his outstanding mortgage would, if at all, be pleadable only as a sort of counter claim to which rules of limitation might be applicable. In the latter view, on the other hand, the mortgage is only pleaded as a defence and in the absence of any rule of limitation extinguishing the right under the mortgage or declared applicable to defences, the defence would always be open. As it is, S. 28 of the Limitation Act applies only to rights to *possession* and there is no general provision that all rights which are barred are extinguished. Similarly, S. 4 bars only institution of suits and has no reference to defences. (See *Lakshmi Doss* v. *Roop Laul*[1] *Ramanasari* v. *Muthusami Naik* [2]).

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1. (1906) I. L. R. 30 M. 169. 2. (1906) I. L. R. 30 M. 248.

NOTES OF INDIAN CASES.

Khimji Vassonji v. Narsi Dhanji I. L. R. 39 B. 682.

The analysis by Beaman, J. of the English law as to liability for inducing a breach of contract, is marked by his characteristic clearness and freedom of thought; but we do not feel sure as to the soundness of his broad proposition that in an action of conspiracy to procure a breach of contract, malice is an essential ingredient of the cause of action. On the findings of fact come to by the learned Judge, the discussion of the legal question appears however to be almost wholly *obiter*.

Towards the close of his judgment, Mr. Justice Beaman starts another interesting question which however he disposes of very summarily. Referring evidently to the rule stated in the Mitakshara (Ch. II S. xi pl. 27) the learned Judge observes that a promise by a Hindu to give his daughter in marriage creates in the other party only a kind of 'conditional right' and that the latter can have no legal remedy if the girl is given away to a preferable suitor. We beg leave to take exception to the rule stated in this form.

To begin with it seems to us open to question, whether *betrothal* (which was the case before Beaman, J.) can be held to involve the elements necessary in law to constitute a binding *contract*. It is true that for a long time the Bombay High Court has treated a betrothal as a contract which, though it cannot be specifically enforced, may support an action for damages against the parent (see *Umed Kika* v. *Nagindas* [1] and the precedents there cited, *Mulji* v. *Gomti* [2]. In the matter of *Ganpat Narain Singh* [3]); and in *Purushothamdas Tribhuvandas* v. *Nathubhoy* [4], Candy, J. awarded damages against a father who could not complete the marriage because of the girl's unwillingness. We venture nevertheless to doubt if, under a system which allows and in fact requires, marriages to be arranged not by the spouses themselves but by their parents or guardians, a suit in the nature of the English law action for breach of promise can be recognised at all. Even in England, it would appear that an action of the kind could not have been maintained before the 17th century *i.e.* so long as marriage remained exclusively a matter of spiritual jurisdiction (per Bowen, L. J.

1. (1870) 7 B. H. C. R. O. C. 122
2. (1887) I. L. R. 11 B. 413.
3. (1875) I. L. R. 1 C. 74.
4. (1896) I. L. R. 21 B. 23.

in *Finlay* v. *Chirney* [1]. Under the Hindu Law, marriage cannot even now be properly regarded as a matter of temporal contract and it seems to us inconsistent with its true spirit to recognise an action for breach of promise. And when the contract relied on is merely one between the parents (or guardians) of the spouses, there is even less justification for allowing a right of action. Under the English Law, the action for breach of promise is 'strictly personal and though in form, it is an action for breach of contract, it is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff' (per Lord Esher in *Finlay* v. *Chirney* [1]). The considerations applicable to such an action cannot apply to an action between the parents or guardians of the spouses. And even in so far as there may be a 'contract' between the parents or guardians, the principle recognised in *Devarayan Chetti* v. *Muthuraman Chetti* [2], is against the enforcement of such contracts. To attach a penalty, whether by agreement or by law, to the breach of the contract, is to create in the parents a pecuniary interest in the marriage of their children, because of the probable desire to escape the penalty. Green, J. in *Umedkika's case* [3], relies on the passage in the Mitakshara as an authority in support of the claim for damages in such cases; but this, as we shall presently show is reading too much into that text.

The rule of Hindu Law in question is laid down by Yajnavalkya first in Ch. I. V. 65 and later Ch. II. V. 146. The first text provides 'Once is a damsel given; he who withholds her (after such gift) shall incur the punishment of a thief; but he may so withhold her if a worthier bridegroom offers.' It is fairly clear from the context that the text deals with the ceremonial act of giving that precedes the marriage rite and has no reference to any 'contract' to give in marriage. (see observations of Sundara Aiyar, J., on the previous verse, in *Ranganaiki Ammall* v. *Ramanuja Aiyangar* [4]). The penalty provided for improper retraction is criminal punishment and not civil liability and the exemption also is only from such punishment (Cf. also the next verse which lays down the punishment for a man who gives a girl in marriage without disclosing her defects, for one who abandons a girl (after receiving her in gift etc.) In the corresponding rule in Narada, the privilege of retraction would seem to be limited to the

1. (1888) L. R. 20 Q. B. D. 494.
2. (1912) 24 M. L. J. 310.
3. (1870) 7 B. H. C. R. O. C. 122.
4. (1912) I. L. R. 35 M. 728.

unapproved forms of marriage. Adverting to the subject again in Ch. II. V. 146 Yajnavalkya adds that the withholder' should also make good the expenditure together with interest' *i. e.*, the expenditure incurred by the bridegroom or by his father or guardian. From the comment of Vijnaneswara on this text it would appear as if this liability to make good the expenses is not limited to cases in which the retraction is without proper cause (See Ch. II S. XI pl. 28); and anyhow there is nothing in the provision either resembling an award of damages for breach of contract in the sense of damages for loss of prospect, loss of reputation, personal suffering etc., or negativing liability for such damages where the breach is due to the appearance of a preferable suitor.

Joharmal Ladhooram *v.* Chetram Harising; I. L. R. 39 B. 715.

We drew attention on a former occasion to some of the legal aspects of what are called joint family firms (29 M. L. J. Notes of Indian cases p. 14). The decision under notice lays down substantially the same views as there submitted, in respect of the liability of the members of the family for the firm's debts. We may in this connection invite attention to a recent decision of the Madras High Court which deals with another aspect of the matter *i. e.*, where a joint family is interested in a partnership comprising outsiders as well. *Ramanathan Chetti* v. *Yegappa Chetti* [1].

Kanaran *v.* Churutha I. L. R., 38 M. 954:

In this case, the question was whether a simple mortgagee was entitled to sell the improvements effected by a tenant introduced into the land by the mortgagor after the date of the mortgage. In effect, the question was, whether a purchaser in execution of a decree on the mortgage would be bound to pay compensation for the improvements effected by such a tenant before he evicts him. If he would be bound, the mortgagee would not be entitled to sell them; if he would not be, it would be otherwise. Section 5 of the Malabar Compensation for Tenant's Improvements Act declares the right of every tenant to compensation for improvements on ejectment. It does not say who is liable to pay, apparently because the legislature intended that whoever the

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1 (1915) 30 M. L. J. 241.

plaintiff, compensation should be paid provided the defendant is a *tenant* within the meaning of the Act. Except, therefore, in so far as the definition of the word "tenant" imposes any limitation, all persons ejecting are liable to pay compensation. Section 3 includes within the definition of that term not only a person who is a lessee, sub-lessee, mortgagee or sub-mortgagee, but also one who in good faith believes himself to be such. What is the exact signification of these words? Is the *formal* validity or belief in the formal validity of the lease all that is required?. Don't they also connote that the person granting the lease should have the power to grant it or should be believed to possess that power. It is impossible to say what the judgment in this case decides on this point. The only point on which the judgment seems to be clear is that the liability to pay the compensation is not restricted to the lessor but whether the learned Judges agree with Sadasiva Iyer, J. and hold that in the particular case the lease being one for a short period, the lease was good or at least was such that the tenant might have in good faith believed that it was good or whether they go further and hold that if the tenant is in fact a lessee or believes that he is in fact a lessee, he would be entitled, it is not clear. The question when it arises, we are afraid, will have to be decided without any guidance or light from this judgment. Their Lordships have not at all explained the significance of the words " in good faith believing to be lessee". Do they signify no more than "*bona fide* intention of attorning and paying rent to the person entitled." This latter clause may apply to property subject to mortgage; it is therefore no doubt just possible that the earlier part of the section also was intended similarly to apply. Whatever the construction that comes ultimately to be adopted, the language of the section can, by no means, be said to be happy.

Mohideen Bee v. Syed Meer Sahib I. L. R. 38 M. 1099.

In so far as this case decides that Article 123 is applicable to a suit by a Mahomedan co-heir for his share it is opposed to the Full Bench judgment in *Khadersa Hajee Bappu* v. *Putten Vittil Ayissa Ummah* [1] and seems to be insupportable.

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1. (1910) I. L. R. 34 M. 511.

NOTES OF INDIAN CASES.

Pranjivandas *v.* **Ichharam** I. L. R. 39 B. 734.

This case raises an interesting question of Hindu Law. In a joint Hindu family consisting of several branches, each branch in turn having several members, some members, from different branches, become divided and walk away with their shares. The rest continue joint and there happen of course the usual changes due to subsequent births and deaths in the family. If, then, a division is to be effected in the family, what are the principles on which the shares of the various members are to be fixed?

With reference to the *property* to be divided, it is the settled rule (subject to a few exceptions as to exclusion, misappropriation, &c.) that it must be taken *as at the date of the division.* The learned Judges in this case apply the same principle to the calculation of shares as well, ignoring all past events. In doing so, they depart, as they themselves recognize, from the method adopted by the Madras High Court in *Manjanatha* v. *Narayana*.[1], the point of difference arising out of the manner in which the *per stirpes* rule is to be worked. The Madras case held that in assigning shares to each branch in the new division, the allotments made to the members of that branch in the former division, should be taken into account, so as to secure equality of division as far as possible. We must agree with the Bombay Judges that this attempt at securing equality is unsupported by any textual authority or legal principle and that many instances may be put in which the method applied in the Madras case would lead to manifestly inequitable results. There is also much force in the Bombay criticism of the theory (suggested in the Madras case) of a final 'mental division' between the branches for certain purposes, while recognising for other purposes (including survivorship between the branches) the *continuance* of the joint family (as distinguished from a reunion). We are, however, unable to agree that the principles laid down in *Appoovier's case* [2], as to the characteristics of a joint family, necessarily militate against the view taken in *Manjanatha* v. *Narayana* [3]; for the latter gives a kind of definiteness only to the shares of the *branches* and not to those of individual members. But it must be admitted that the Bombay view better accords with

1. (1882) I. L. R. 5 M. 362. 2. (1866) 11 M. I. A. 75.
3. (1882) I. L. R. 5 M. 362.

the spirit of the notion of a joint family, whose continuance, in spite of the partial division, is assumed in both the cases.

In so far as reliance is placed in both the decisions on the law considered to be respectively applicable, in the two Presidencies, to the analogous case of a division among 're-united' co-parceners, we venture to doubt if the texts of the Smriti Chandrika or the Mayukha dealing with this matter, really afford any help in the solution of the present question. The point of difference between the two works, on that subject, arises out of the difference in their respective views as to the true nature and effect of 're-union.' The Mayukha allows re-union among all persons who may be parties to a division see also the Viramitrodaya Ch. 4 S. 3 while the Chandrika, putting a narrow construction upon Brihaspati's text, holds that a re-union is possible only among the three specified relations and here, it accords with the view of Vijnanesvara (Mit. Ch. II. S. IX. p. 3) and Jimutavahana (Dayabhaga Ch. XII. p. 4). As to the effect of a re-union, the Mayukha seems to regard the re-united members as constituting a 'joint family', a partition amongst whom will be governed by the same rules as apply to an ordinary partition effected for the first time; but the Chandrika deals with the new status rather as a contractual relation, with certain special incidents and provides that in a partition between the re-united members, the shares shall correspond to the share capital (so to say) brought in by each member at the re-union.

We may point out that the Smriti Chandrika view as to the effect of re-union has not been accepted by the Madras High Court in *Kristraya* v. *Venkatramayya* [1] followed in *Narasimmacharlu* v. *Singaramma* [2] and if the re-united members are to be regarded as 'co-parceners,' it would be introducing a *new* kind of co-parcenary, to hold that in the event of a division amongst them, it should be on principles different from those applicable to an ordinary co-parcenary under the Hindu Law (See Observations in *Jogeswar Narain Deo's case* [3] against introducing a new kind of survivorship).

It is true that the text of Yagnavalkya as to division *per stirpes* (Ch. II. 121) has reference only to an ordinary general partition but all the commentators seem to agree that that

1 (1903) 19 M. L. J. 723, 2. (1909) 19 M. L. J. 719.
3. (1896) I. L. R 23 C. 670 s. c. 6 M. L. J. 75.

text applies to a second division also, between re-united co-parceners. And taking it with the text of Manu (Ch. 9 V. 210) which ordains equality of partition even amongst re-united co-parceners, it seems reasonable to hold that the texts justify a '*per stirpes* equality' in the second division and that there is no warrant for 'moderating' this, as it were, by reference to the allotments made at the first division.

Subramanya v. Balasubramanya: I. L. R. 38 M. 927.

The Judgment of the Full Bench in this case removes the hardship that used to be caused by the case in *Dorasami* v. *Venkataseshayya* [1] without any apparent compensating advantage. The new Civil Procedure Code has removed what little foundation there was for the older view. On the judgment of the Full Bench two points strike one. The first is whether the rule would hold good when both the mortgages have fallen due and can be sued upon. The case under consideration was one of that sort though no reference is made to that fact. Apparently no importance was attached to it. In the case of successive leases it has been held that though each lease furnishes a separate cause of action, one action should be brought for the whole amount if at the time of the suit, the rent for more than one year has accrued due *Shanmugam Pillai* v. *Syed Ghulam Ghose* [2]. The second thing is, would the rule adopted by the Full Bench *viz.*, that each mortgage furnishes a distinct cause of action justify the reservation of the claim on the second mortgage when a suit is brought on the first? We fancy not for the second mortgagee is certainly a necessary party to the suit on the first mortgage and is bound to have his claim provided for in the decree. It need hardly be said that this judgment leaves unaffected the other rule laid down in *Dorasami* v. *Venkataseshayya* [1] that the mortgagor is bound to redeem all the mortgages existing on the property in favour of the mortgagee.

Kimber v. The British India Steam Navigation Co., Ltd., I. L. R. 38 M. 941.

In this case, following the judgment of the Privy Council in *Chartered Bank of India Australia and China* v. *British India*

1. (1901) I. L. R. 25 M. 108. 2. (1903) I. L. R. 27 M. 116.

Steam Navigation Co. [1] their Lordships declined to follow *Shaik Mahomed Ravuther* v. *British India Steam Navigation Co.* [2]. As Mr. Justice Tyabji rightly points out, the judgment in the latter case is not a Full Bench judgment. Anyhow, the decision of the Privy Council on the direct point involved though on an appeal from another part of the King's Dominions must bind the Indian Courts. His Majesty in Council is one tribunal whatever the quarter from which the appeal comes.

Yellammal v. Ayyappa Naick I. L. R. 38 M. 972.

Though the term "movable" in Art. 29 would seem to include a debt (see S. 3 of the General Clauses Act) and the Full Bench in *Chidambaram Pattar* v. *Ramasami Pattar* [3] has seen nothing incongruous in applying the word *possession* to debt, the close affinity between the Civil Procedure and the Limitation Acts and the *a priori* likelihood of the use of the term in both the Acts in the same sense predisposes one in favour of the view taken by the Judges in this case which has the additional recommendation of giving the word its natural meaning.

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1. (1909) A. C. 369. 2. (1908) I. L. R. 32 M. 95.
3. (1903) I. L. R. 27 M. 67.

NOTES OF INDIAN CASES.

Drigpal *v.* **Kallu:** I. L. R. 37 All. 660.

Referring to the provisions of S. 5 of Act XIV of 1859 (which corresponds to Art. 134 of the present Limitation Act) Lord Cairns said "Their Lordships cannot fail to observe that the provisions of this section are of an extremely stringent kind. They take away and cut down the title which *ex hypothesi* is a good title of a *cestuique trust* mortgagee, &c.***. They cut down that title as regards the number of years that the person would have had a right to assert it; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this section should clearly and distinctly show that he fills the position of the person contemplated by this section as a person who ought to be protected." *Radanath Doss* v. *Gisborne* [1]. The change of language in Art. 134 does not in any way affect the force of their Lordships reasoning. We may, therefore, take it that even under the present Act the burden of proving the requisites necessary for claiming the benefit of the article is on the defendant. Observations to the contrary in this case are opposed to their Lordships' view and must be disregarded. (See *Muthu* v. *Kambalinga* [2], *Veerabadra Tevan* v. *Veerappa Tevan* [3], *Vythilingam Pillai* v. *Kuthirvatta Nair* [4], The first requisite according to their Lordships for the application of the article is that the defendant should be a purchaser, that is to say, one that not merely purchases a mortgage as mortgage but one that purchases that which is *de facto* a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title. Their Lordships expand the same idea by referring to the averments necessary to constitute a plea of purchase for value. The very first averment in such a plea is that the person selling was either seized or alleged that he was seized for an absolute title, and then it goes on to say that being so seized or alleging to be seized, he contracted to sell and did sell and convey that absolute title asserting it to be such to the purchaser who paid the money for that which was thus sold. A person that purchases with the knowledge that the seller has not the title which he purports to convey could not be said either to believe that full title passes to him or to pay for the full title. The

1. (1871) 14 M. I. A. 1
2. (1889) I. L. R. 12 M. 316.
3. (1906) I. L. R. 29 M. 501.
4. (1912) 15 I. C. 609.

reasoning of their Lordships it will be noticed is not based on the words "in good faith" which are now deleted but on the word "purchaser". The omission of those words can justify at best only the letting in of people with constructive notice of the defect of title *Pandu* v. *Vittu* [1]. The retention of those words would have excluded a number of persons who may have honestly believed in the title but for want of due care and caution (See Sec. 3), might be unable to take the benefit of the article. The case where both the parties know the source of title, for instance in the not unfamiliar case of mortgages by conditional sale but believe on a mistaken construction of the document that the title of the vendor has become absolute, is somewhat on the line but we should fancy that it would, notwithstanding protestations of the parties to the contrary, be only a case of assignment and Art. 148 would apply. The alteration of the word, "purchase" into "transfer" designed as well-known to neutralise the effect of *Abhiram Goswami* v. *Shyamacharan Nandi* [2] cannot have the effect of also reversing the whole course of decisions on the construction of the article. Such a violent change of policy would have been more clearly indicated if really meant. (See 3 L. W. 19). Even apart from the history behind it, the words of the article "property mortgaged and afterwards transferred by the mortgagee" could only apply to *actual dealings* with the *property* mortgaged and not to dealings *in fact* with the *mortgage* though ostensibly with the *property*. The instance put by us above would on the parties' own showing be a case of dealing with the *mortgage* though they protest that it is a dealing with the *property*.

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1. (1894) I. L. R. 19 B. 140. 2. (1909) I. L. R. 36 C. 1003.

NOTES OF INDIAN CASES

Abdul Ghafer *v.* Nur Jahan Begam : I. L. R. 37 All. 434.

The Allahabad High Court had to consider in several cases recently, the proper article of limitation applicable to suits brought by one of the heirs of a deceased Mahomedan against his co-heir for his share of the money realised by the latter out of the debts due to the estate. *Masiuddin* v. *Imtaz Unnisa* [1], *Amina Bibi* v. *Nagin Unnisa Bibi* [2], *Parsotam Rao Tantra* v. *Radha Bai* [3]. Their Lordships uniformly applied Art. 62 of the Limitation Act. Such suits ought, we think, to be carefully distinguished from suits for partition of movables belonging to the estate which are governed according to the Madras Full Bench case in *Khaderesa Haji Bapper* v. *Putter Vittil Syissah Ummah* [4], by Art. 120. The money realised by one of the co-heirs is not money belonging to the estate though it is money representing the estate. The movable property belonging to the estate is the debt and not the money recovered. In the absence of a succession certificate payment to one of the co-heirs may not at all bind the other co-heirs and adoption of the payment by the other co-heirs is entirely optional with them. This aspect of the case seems to be overlooked in *Addul Rahiman* v. *Pathummal Bibi* [5]. Again, though action for a share of the money realised may be barred, it may well be when a suit for partition is brought by the member who has made the collection or for the matter of that even when he is a defendant, his collection might be taken account of in distributing the property See *Nooroodin Saheb* v. *Ibrahim Saheb* [6]. Again in this country, where Mahomedan co-heirs live together and one of them acts as manager, the court may well deal with him on the footing of an agent, or *de facto* guardian, according as the other heirs are majors or minors, liable to account *Parsotam Rao Tantra* v. *Radha Bhai* [7]. It may even be that when one co-heir receives the money as *co-heir* on behalf of himself and the other heirs, his further possession of the amount should be treated as adverse only on a refusal by him to account

1. (1914) I. L. R. 37 A. 40.
2. (1915) I. L. R. 37 A. 233.
3. (1915) I. L. R. 37 A. 318.
4. (1910) I. L. R. 34 M. 511.
5. (1915) 30 M. L. J. 104.
6. (1910) 20 M. L. J. 964.
7. (1915) I. L. R. 37 A. 313.

for the same. See *Marian Biviammal* v. *Kadir Mira Saheb Tangan* [1], and *Abdul Rahiman* v. *Pathummal Bibi* [2]. It must at least be open to them to ratify his act on their behalf and call upon him to account for the amount got. Again, as held in *Subbarao* v. *Ramarao* [3], a suit for account is not governed by Art. 62; wherever an accountable relationship is established, the application of that article would be excluded. Where no such accountable relationship exists, we think the Allahabad High Court is right in holding that that article would apply. We are not quite certain, however, that the case under review was not a case of such accountable relationship. Though *Mahamad Rissat Ali* v. *Hasain Banu* [4] is not an authority for holding that Art. 62 is not applicable to a case like the present it is an authority for the position that an action against a person who takes possession of the movable property of a deceased man by another claiming as heir is not an ordinary action for specific movables against a person wrongfully taking possession to which Art. 49 would apply but an action to establish title as heir governed by Art. 120. That could be only on the ground that defendant's possession is that of an executor *de son tort* liable to account to the rightful heir. Both trustees *de son tort* and guardians *de son tort* are known to law and are subject to all the liabilities of trustees and guardians *de jure*. The position of the defendant in the case under review was one very closely resembling that of an executor. The defendant had taken out a succession certificate which gave him an exclusive title to collect the debt and had collected the debt and S. 25 of the Succession Certificate Act contemplates a liability to account, though it cannot be said to impose it.

Ali Haffiz *v.* Abdur Rahaman I. L. R. 42 C. 1135.

We do not quite follow the learned Judge when, with reference to *Budh Singh* v. *Niradbaran Roy* [5] and *Budree Doss* v. *Chooni Lal* [6], he says, "I am quite in agreement with them in so far as they decide that relief such as is asked for here against defendant No. 2 does not come within the scope of S. 539 of Act XIV of 1882 * * * * but I see no reason why * * * * * * he

1. (1915) 29 I. C. 275.
2. (1915) 30 M. L. J. 104.
3. (1915) 30 M. L. J. 341.
4. (1893) I. L. R. 21 C. 157 (P.C.)
5. (1905) 2 C. L. J. 431.
6. (1906) I. L. R. 33 C. 789.

should not in this suit be declared to be a trustee of the trust property and be directed to convey the property." So far as we can gather from the report, the relief asked for against defendant No. 2 was a declaration of the invalidity of the alienation in his favour and an order that he and the trustee should deliver up the conveyance for cancellation and execute releases, etc.

Taking the question of 'reliefs' there is little difference in substance between those which, in the cases cited were held to fall outside S. 539 and the one suggested by the learned Judge *viz.*, a direction to the alienee to convey. If the decisions merely rested on the ground that, as the plaintiffs suing under S. 539 have themselves no title to possession, they cannot get a decree in ejectment, it may be another matter. But in so far as they proceed on the footing that that section warrants any reliefs or directions being given, only of the nature and to the extent specified in the sub-clauses of the section, it cannot be consistently held that a declaration of invalidity in respect of a particular alienation or a direction to the alienee to reconvey to the trustee will be covered by that section. The learned Judge evidently holds that though the declaration and direction referred to by him are beyond the scope of S. 539, there is nothing to prevent a prayer for such relief being combined with a suit under that section, and in support of this view he relies on O. 1, R. 3, C. P. C. (old S. 28).

On this question of joinder we are not sure if the rules of O. 1 which were intended to apply to cases in which the suit is, as ordinarily happens, brought by a person to vindicate some right of his own, can be held to govern suits under S. 92 (old, 539.) And this will apply to the reliance placed by Seshagiri Aiyar, J. in *Raghavalu Chetty* v. *Pellati Sitamma* [1] on R. 10 of O. 1. As for arguments of convenience and expediency, they seem to be advanced on both sides. The objection to a joinder of the kind in question would really seem to rest not on any particular rule but on the ground that in creating a special procedure and an exclusive jurisdiction under S. 92, the legislature is not likely to have intended to allow the inclusion in such suits, of questions which do not strictly relate to the 'execution' of the trusts or matters which under the ordinary law may be agitated in courts of other grades.

1. (1914) 27 M. L. J. 266.

The law is at present in a state of regrettable uncertainty as to the place of alienees in suits under S. 92 C. P. C. In the Legislation of 1908, the conflict of cases as to the question of the removal of trustees was set at rest, but the legislature has not dealt with the present question, though judicial opinion was as sharply divided on this point also We must, however, point out that the argument based on the analogy of the English decisions under Romilly's Act cannot have much weight in future, for that has been expressly departed from by the legislature, in including 'removal' under S. 92. We may also add that many cases like *Zafaryah Ali* v. *Baktawar Singh* [1], *Sheoratan Kunwari* v. *Ram Pargash* [2], *Dasondhay* v. *Muhammad Abu Nasur* [3], *Lakshman Das Parashram* v. *Ganpatrav Krishna* [4], *Kariz Hassan* v. *Sagun Balkrishna* [5], though sometimes referred to in this connection, have really no bearing on the question under consideration; for rightly or wrongly, the claims were there made and the reliefs awarded on foot of the personal rights of the plaintiffs and quite independently of S. 539. Nor is any analogy afforded by decisions that only hold that suits *by trustees* to recover possession of trust properties are outside that section. Cf. *Vishvanath Govind Deshmane* v. *Rambhat* [6], *Shri Dhundiraj Ganesh Dev* v. *Ganesh* [7], *Muhammad Abdul Majid Khan* v. *Ahmad Said Khan* [8], *Ayatunnessa Bibi* v. *Kulfu Khalifa* [9]. Amongst the relevant cases, the Madras view seems to be that alienees should not be made parties to suits under S. 92 (Cf. per Wallis, C. J. in *Raghavalu Chetti* v. *Seetamma* [10]. That was also the view indicated by Mookerjee, J. in *Budh Singh's case* and by Woodroffe, J. in *Budree Doss's case.* The inclination of the Allahabad High Court was also at one time, in the same direction See *Huseini Begam* v. *The Collector of Moradabad* [11]. In *Sajedur Raja Chowdhuri* v. *Gour Mohun* [12], Banerjee and Rampini, JJ. went to the other extreme and held that the general words of the last sub-clause in S. 539 will cover a claim to recover possession from third parties to whom trust properties

1. (1883) I. L. R 5 A. 497.
2. (1896) I. L. R. 18 A. 227.
3. (1911) I. L. R. 33 A. 660.
4. (1884) I. L. R. 8 B. 365.
5. (1899) I. L. R. 24 B. 170.
6. (1890) I. L. R. 15 B. 148.
7. (1893) I. L. R. 18 B. 721.
8. (1913) I. L. R. 35 A. 459
9. (1914) I. L. R. 41 C. 749.
10. (1914) 27 M. L. J. 266.
11. (1897) I. L. R 20 A. 46
12. (1897) I. L. R. 24 C 418.

may have been improperly alienated. This view however has not found general acceptance.

Recent decisions tend to something like an intermediate view. While recognising that no relief, whether by way of possession or by way of declaration, can be awarded in such suits as against alienees or trespassers in possession, they hold that they would be proper parties to such suits, so that the Court may be enabled effectually to adjudicate on the character of the property in their possession or the propriety of the alienation under which they claim. Cf. *Ghazaffar Hussain Khan* v. *Yawar Husain* [1] *Manohari* v. *Muhammad Ismail* [2] *Collector of Poona* v. *Bai Chanchal Bai* [3] and per Seshagiri Aiyar, J., in *Raghavalu Chetti's case* [4]. This immediately raises the question whether the finding arrived at in the suit under S. 92 will be *res judicata* in any subsequent suit for possession by the trustee against the trespasser or alienee. In view of the difficulty in holding that the trustees—plaintiffs in the later suit—are persons 'claiming under' the plaintiffs in the earlier suit and in giving a conclusive effect to 'findings' against which as mere findings the trespasser or alienee could not have appealed, there is a natural hesitation to apply the rule of *res judicata* in such cases see however *Manohari* v. *Muhammad Ismail* [2]. It is also for consideration whether the rule laid down in *Ramados* v. *Hanumantha Row* [5] as to the conclusiveness of a scheme will have any and what bearing on this question.

Tarakumari *v.* **Chaturbhuj Narayan Singh** I. L. R. 42 C. 1179 (P. C.)

There was practically no dispute about the facts in this case, but the courts have successively differed as to whether or not they warrant an inference of an 'intention to become separate.' We must, with all respect, confess our inability to see in the extracts cited from the Judgment of the High Court, any fallacy of the kind with which their Lordships seem to charge the learned Judges of the High Court, *viz.*, a notion that 'there could have

1. (1905) I. L. R. 28 A. 112.
2. (1911) I. L. R. 33 A. 752.
3. (1911) I. L. R. 35 B. 470.
4. (1914) 27 M. L. J. 266.
5. (1911) I. L. R. 36 M. 364.

been no complete separation of the joint family as the impartible estate had not been partitioned.' We would also venture to say that to the Indian mind, the circumstances relied on in their Lordships' judgment seem by no means convincing proof of an intention to become divided, in the sense, as the High Court put it, of 'sacrificing the expectancy to succeed'' to the impartible estate, by (or on the analogy of) survivorship. The non-existence of co-parcenary rights in the impartible estate or the recognition of the Zemindar's right of alienation does not bear on the question of the joint character of the *family*; and in view of the decisions of the same Board in the *Belgaum case* [1] and the *Devara Kota maintenance case* [2] the present ruling, it seems to us, cannot be regarded as an authority except on the facts of the particular case.

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1. (1897) I. L. R. 20 M. 256 P. C. 2. (1900) I. L. R. 24 M. 147 P. C.

NOTES OF INDIAN CASES.

Majidmian *v.* Bibisaheb I. L. R. 40 B. 34.

Though the right of a widow, under the Muhamadan Law, to *retain* possession of her husband's estate till her dower-debt is discharged, has long been recognised, the incidents of that right seem to remain as yet unsettled; and the decisions collected in the Judgment of Tudball J. in *Ali Buksk* v. *Allahdad Khan* [1] afford striking proof of the prevailing confusion and conflict of case-law on the point. The basis on which the right was originally founded has now nearly ceased to be given effect to, *viz.*, the general right under the Muhamadan law of *any* creditor of a deceased person to help himself to the property of the deceased with a view to repaying himself—and the matter accordingly falls to be decided not so much by the logical application of definite principles as by the interpretation of particular *dicta* to be found in reported cases. The observations of the Judicial Committee in *Bebee Bachun's case* [2] are clear enough, so far as they go, but they do not exhaust all aspects of the question. Neither the analogy of a lien nor that of a mortgage (whether simple or usufructuary) is complete and the conception of the right as a 'personal' privilege has proved equally misleading. On the question of 'transferability', some confusion has arisen from the omission to take note of the distinction between a transfer of the 'property' itself by the widow and the transfer of the 'right to remain in possession' as incidental to a transfer of the dower-debt. On the point of heritability, the cases do not seem to have always kept in view the difference between the right of the widow's heirs to sue *for the first time* to get possession on the strength of her claim to dower and their right to get back the possession of which they or the widow might have been deprived. As to the origin of the widow's possession, it does not seem necessary to show that it was *with the consent of the heirs*; only it should not have commenced in fraud or by force. As to the remedies of the widow in possession to recover her dower, reference may be made to *Mohammad Sharafat* v. *Wahida Sultan Begum* [3]. We are, however, not sure if one of the assumptions made in the case under notice can be regarded as beyond question, *viz.*, that the widow or her heirs may be entitled to continue in possession even after a suit for the dower has become barred.

1. (1910) I. L. R. 32 A. 551.
2. (1871) 14 M. I. A. 377.
3. (1914) 19 C. W. N. 505.

Madappa Ganappa *v.* **Joki Ghosal**; I. L. R. 40 B. 60.

While there are several cases which hold that a claim though barred may be available as an equitable set-off in a *suit*, a recent decision of this Court has laid down a different rule, *Vyravan Chetti* v. *Daivasikamani* [1]. As regards, *execution*, there are two classes of cross-claims; provided for respectively by Rr. 18 and 19 of O. 21 Civil Procedure Code. Where the claims are under *different* decrees, there can be, it would appear, no set-off with reference to a barred decree for R. 18 can apply only if the two decrees are capable of execution at the same time, *i. e.*, it is only if steps had been taken in time, that the two decrees would have operated as mutual satisfaction *pro tanto.* Where the cross claims arise under the *same* decree, the party entitled to the smaller amount has no right to take out execution and no question of limitation can therefore arise so far as he is concerned. As for the direction to enter up satisfaction, this seems to be a direction to the Court and in any event, it is not subject to the limitation prescribed by Art. 174. The rule proceeds to say that the party entitled to the larger sum can take out execution only for the difference between the two amounts.

The principle is simple enough, but difficulties may arise in its practical application, in cases where the amounts are ascertained at different times. The solution will depend upon the manner of applying Art. 182 to cases in which a decree is 'partly preliminary and partly final.' This is a complication introduced by the new Code. What is the starting point for execution of that portion of a decree which is 'final.' There can be no doubt that it *can* be executed as from the date of its passing; if so, why not start limitation immediately and if this is to be the rule, we venture to doubt if the passing of a further final decree several years later in respect of the other party's claim, can resuscitate the right under the original final decree so as to bring the case within O. 21, R. 19.

Nazaralli *v.* **Babamiya** I. L. R., 40 B. 64.

This case illustrates the rule that it is not every administrative prohibition that will invalidate a sub-contract. The prohibition against sub-letting must be based on statutory authority, so as to have the force of law, before a violation of it can bring a case under S. 23 of the Contract Act.

1. (1907) I. L. R. 34 C. 329. (P. C.)

NOTES OF INDIAN CASES.

Kameswaramma *v.* Venkatasubbarao: I. L. R. 38 M. 1120.

Ordinarily a decree for debt obtained against the father before partition is not executable after partition against the son and the family property allotted to him. The foundation of the Court's jurisdiction to execute the decree against the family property being the father's power to alienate for his debt, on that power ceasing to exist, the Court's jurisdiction also must cease and the only remedy open to the creditor is, we think, to sue the sons upon the decree-debt if he is in time for it. Where the decree is against the father in his representative capacity or the partition is fraudulent, other considerations apply and the decree would be executable against the family property notwithstanding the partition. What exactly will constitute fraud which will vitiate a partition may be a point of some nicety and has not been the subject of judicial consideration. It is doubtful if a *real* partition, the allotment being *fair*, can be ignored merely on the ground that the object of the partition was to defeat the execution of the decree.

Meenakshi *v.* Muniandi Panikkan: I. L. R. 38 M. 1144.

If the Mitakshara provided rules of inheritance for only specified kinds of married woman's property and left other cases unprovided for, there would then have been scope for the application of the rules of equity and good conscience. But, as it is, Vijnaneshwara, having defined stridhana so as to include all kinds of property belonging to a woman the rule of inheritance prescribed by him should be followed however unmeritorious the particular mode of acquisition might be. In the line so prescribed, neither the illegitimate son nor the illegitimate daughter find a place. By prostitution a woman does not cease to be a married woman and as such the acquisition of a married woman who has turned prostitute will have to devolve according to the rules prescribed for the devolution of the property of a married woman. The case of a woman who is neither a married woman nor a maiden but a prostitute, is one unprovided for and in such a case, the Court may well have regard to some of the equitable considerations referred to in the earlier cases though the foundation of those considerations requires more elaborate consideration than has been given them.

Muthukaruppan Samban *v.* **Muthu Samban**: I. L. R. 38 M. 1158.

Having regard to the fact that sales of "reversions" as "intangible property" require registration irrespective of their value though it cannot be said that they are incapable of possesssion (See *Inasi Pillai* v. *Sivagnana* [1]) we do not think that cases like *Palani* v. *Selambara* [2] can be looked upon as safe guides for the construction of S. 54 of the Transfer of Property Act. While we agree that *Sibendra Pada Banerjee* v. *Secretary of State for India in Council* [3] went too far if it decided (which is doubtful) Cf. *Sonai Chutia* v. *Sonaram Chutia* [4] that a property in the prior occupation of the vendee cannot be sold by delivery of possession, and that for such delivery it may not be necessary "to have recourse to the expedient of quitting the property at one moment and entering upon it at another", and "appropriate acts or declarations" on the spot may be sufficient (Cf. *Shaik Ibhram* v. *Shaik Subman* [5], *Humera Bibi* v. *Naimunnissa Bibi* [6]. Ex parte v. *Fletcher* [7]), we do not think that mere request by the vendor to the vendee to remain in possession in the capacity of vendee not made on the premises, would be sufficient. In cases where the prior possession is under a registered document which cannot be validly cancelled without writing (*See* S. 92 of the Evidence Act, Proviso 4), we should think that even the quitting of possession by the mortgagee or the lessee and then entering upon it would be insufficient. Publicity being one of the objects of insisting on delivery of possession, courts should so construe the section as to secure the largest amount of publicity to the transaction without getting into metaphysical niceties about "possession."

On another point decided in the case also, we entertain doubts. Though S. 4 of the Transfer of Property Act makes S. 54 supplemental to the Registration Act, it does not make it a part of S. 17 in which case only S. 49 would prohibit the use of the unregistered sale deed as evidence of the terms of sale. S. 91 of the Evidence Act also does not prohibit its use for the purpose. But the question remains whether when the deed is the mode in

1. (1894) 5 M. L. J. 96.
2. (1886) I. L. R. 9 M. 267.
3. (1907) I. L. R. 34 C. 207.
4. (1915) 20 C. W. N. 195.
5. (1884) I. L. R. 9 B. 146.
6. (1905) I. L. R. 28 A. 147.
7. (1877) L. R. 5 Ch. 809.

which the parties wanted to convey property, it is permissible to rely upon other elements that might, if the parties so intended, have sufficed to convey title. On the whole, we should think, in the absence of clear evidence that title was intended to be conveyed by the deed and not otherwise, *ut res magis valeat, quam pereat* the transaction should be upheld *Kathari Narasimha Ragu* v. *Bhupathi Ragu* [1].

Arunachala Aiyar, v. Ramaswami Aiyar I. L. R. 38 M. 1171.

In *Kovuri Basavivi Reddi* v. *Tallapragada Nagamma* [2], the distinction between actions on covenant for title and those for the refund of purchase money based on failure of consideration was not sufficiently borne in mind and we think the view therein taken is rightly dissented from in this case. The action on the covenant is an action for damages and the breach takes place on the date of the sale whereas the other is an action for the restoration of the benefit obtained by the defendant under a contract which has become void (see Ss. 64 and 65 of the Contract Act) and is governed by Art. 62 or 97 according as the failure of the consideration is from the date of the sale itself or later. It is open to the vendee to frame his action as it suits him, there being no rule of law compelling him to frame it one way or the other but having once elected to frame his action in one way, it may be he would be bound by it. There is a similar option allowed to parties in some cases to sue in *tort* or to waive the *tort* and sue in the form of "money had to the use of" Where the failure of consideration is on the date of the sale itself, it is more advantageous to the vendee to rely upon the covenant for title, the period of limitation being longer than under Art. 62 and a larger amount being also generally recoverable under the former kind of action than under the latter but where there is some consideration to start with, as for instance where possession is transferred to the vendee and he is evicted only later, it is generally more advantageous to the vendee to rely upon Art. 97 as under that Article time runs only from the date of the failure of consideration. On the other hand, it is doubtful if an action in this form will lie unless there is a total failure of consideration while damages on the covenant can be had for any defect in the title, however small.

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1. (1915) 29 M. L. J. 721 2. (1912) I. L. R. 35 M. 34.

Venkatesha Malia *v.* Ramaja Higde: I. L. R. 38 M. 1192.

In *Srinivasa* v. *Venkata*[1] it was held that where sanction is obtained from the District Court for two reliefs, a suit cannot be maintained for only one of them. This case extends the principle further and holds that where sanction is obtained by two persons, one of them alone cannot maintain the action relying upon the sanction. The extension may be sound enough but the question is to what extent the suit brought must tally with the petition presented before the District Judge. S. 18 does not say that a copy of the proposed plaint should be filed and sanction obtained for the same as is the case in England where Attorney-General's leave is to be obtained to a Relator's action. Section 18 of the Religious Endowments Act it will be noticed, does not give the Court any discretion in the matter provided it is satisfied that there are *prima facie* grounds, it is bound to give sanction. Is the party bound also to confine himself to the grounds that found favour with the Judge? At any rate, it cannot be that the Court is bound to disregard all considerations other than those that weighed with the Judge that gave sanction.

If one of the parties that obtained sanction dies before suit, is the other precluded from suing? We have the authority of the Allahabad High Court on S. 92 Civil Procedure Code that a suit under S. 92 C. P. C. may be continued even though the parties obtaining sanction die but their Lordships hold that Court's leave must be obtained by the new parties. This is an extension of S. 92 on English analogies and seems to have little justification in S. 92. Having regard to the practice of submitting plaints for the sanction of the Attorney-General and the large powers of intervention possessed by him we think that the English analogies are not likely to help us much in the matter. But on the wording of the section, leave being for the *suit*, any substantial alteration of the suit either in respect of the parties, or the reliefs or the substantial grounds for relief might require a sanction from the Court before the suit is instituted in an altered form but when once the suit is instituted, further procedure, we should think, be entirely governed by the rules of the Civil Procedure.

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1. (1887) I. L. R. 11 M. 148.

NOTES OF INDIAN CASES.

Subbareddi *v.* Yenkatrami Reddi: I. L. R. 38 M. 1187.

We must confess we are unable to appreciate the distinction made in this case between the contract by an individual member of a joint Hindu family to assign his share in the entire family properties and the contract by him to assign his share in a portion only of the family property. In strict theory, the one is as little assignable as the other *Sadaburt Pershad Sahoo* v. *Foolbash Pershad Sahoo* [1]. The interest of the individual member in the entire family property is not in essence different from that in any portion of it and in theory the objections to enforcing his contract in respect of the latter are equally applicable to the former. To specifically enforce contracts for the sale of individual member's shares is an advance upon the law as laid down by the earlier decisions which only recognise alienations actually effected and one is not certain if in so doing the Courts have not contravened the rule laid down by the Privy Council in *Luxman* v. *Ramachandra* [2]. It is hardly fair that the Court should lend itself to create an equity in favour of the vendee against the family. The course suggested in *Vosuri Rama raju* v. *Ivalury Ramalinga* [3] of enforcing specific performance of the contract for the sale of specific property (not merely the share of the individual member) against the individual who entered into it without deciding whether the sale is binding against the family is specially objectionable from this point of view, although it avoids the decision of difficult questions of equity between the family and the stranger in advance before an actual suit for partition is brought. If the courts should be inclined to specifically enforce such contracts we think that all questions as regards the binding nature of the contracts as against the other members should be decided in the suit for specific performance itself and there does not seem to be any thing against principle in its being so done especially when possession is claimed (see S. 27 cl. (c) Specific Relief Act. *Shunmugham Chetty* v. *Subba Reddy* [4]. *Alagappa Mudaliar* v. *Sivaramasundara Mudaliar* [5]. *Merbai* v. *Perozbai* [6]. *Krishnaswami* v. *Sundarappayya* [7]. L.R. 5 Esq. 917. Daniell's Chancery Practice vol. i. p. 194 Fry on Specific Performance para. 209. Even where the contract is only

1. (1869) 12. W. R. 1. F. B.
2. (1880) I. L. R. 5. B. 48 (P. C.)
3. (1902) I. L. R. 26. M. 74.
4. (1915) 31 I. C. 1.
5. (1895) I. L R. 19. M. 211.
6. (1881) I L. R. 5 B. 268 at 277.
7. (1894) I. L. R. 18 M. 415.

for the sale of the share of an individual member, the Court must have the other members of the family before it and go into the question if the share contracted to be assigned could be equitably and without prejudice to the other members be assigned to the vendee and order specific performance only in the event of its finding that it could be so done. If having regard to the value of the property or otherwise the work of determining the equities is disproportionately heavy or unfair to the vendor or the family the Court should reject the claim for specific performance. It will be observed that these considerations would not generally apply to contracts for the sale of the share in the entire family properties and ordinarily speaking, they could be specifically enforced without any injustice.

Mancharam *v.* Panabhai I. L. R., 40 B. 51.

We have nothing to say against the result of the case; but it seems to us desirable to point out that the judgment should not be understood to imply that in cases where a Hindu widow's transaction is not fictitious but operative, Art. 91 of the Limitation Act will apply to a suit for possession by the reversioner. The learned Judges might well have rested their decison on the ground that where a reversioner impeaches a widow's transaction as beyond her powers, it is not necessary for him to 'set it aside' within the meaning of Art. 91, *Bijoy Gopal Mukerjee* v. *Krishna Mahishi Debi* [1].

Hanuman Pershad *v.* Judu Nandan Thakur I. L. R. 43. C, 20.

As early as 1872 the Judicial Committee emphasised the need for a strict construction of the provision in the Civil Procedure Code against *benami* purchases in execution sales (*Buhuns Kowar* v. *Buhooree Lal* [2] and they recognised that the real owner *if in possession* may rely on the benami character of the purchase *as a defence.* (*See also Lokhee Narain* v. *Kallypoddo* [3]). Their Lordships' observations do not cover the intermediate case, of the real owner in possession suing *as plaintiff*, for a declaration or injunction, as against the certified purchaser. Such were the cases in *Sasti Churn* v. *Anopurna* [4] and *Bishon Dial* v. *Ghaziuddin* [5], where the courts differed in their view; and in the present case, Coxe J, expresses his agreement with the Allahabad view. We cannot help feeling that the decision in *Sasti Churn's case* is inconsistent with the express language of S. 317 C. P. C.; for the section is not confined to suits for 'possession'. We have also to state that the reasoning of the Madras High Court

1. (1907) I. L R. 34 C. 420.
2. (1872) 14. M. I. A. 496.
3. (1875) L. R. 2 I. A. 154.
4. (1896) I. L. R. 23. C. 699.
5. (1901) I. L. R. 23. A. 175.

in *Monappa* v. *Surappa* [1] is, if possible, even more directly opposed to the section, for there the suit was for possession. The argument of waiver or transfer of title, by the giving up of possession to the real purchaser, is met by the remarks of the Privy Council in *Buhuns Kowar case*; and as pointed out in the Allahabad case, the learned Judges of the Madras High Court have evidently misread some of the observations of the Judicial Committee. The decision must be taken to have been dissented from, in *Kandasami* v. *Nagalinga* [2] and *Kamurudeen* v. *Noor Mahomad* [3]. It is scarcely necessary to add that cases like *Baldh Singh Doodhooria* v. *Ganesh Chunder Sen* [4] and *Narasimha Razu* v. *Veerabhadra* [5] rest on a different principle, *viz.* that in virtue of the pre-existing relation between the parties, the purchase by the one enures, in whole or in part, to the benefit of the other. The recent decision of the Judicial Committee in *Ganga Sahai* v. *Keshri* [6] is another illustration of the same principle.

Puncha Thakur *v.* Bindeswari Thakur, I. L. R. 43 C. 28.

Recent decisions on the question of the alienability of offices connected with religious institutions are far from easily reconcileable. Cf. *Sundarambal Ammal* v. *Yogawana Gurukkal* [7] with *Mahamaya Debi* v. *Haridas Haldar* [8], and the present case seems only calculated to add to the confusion. We note with some surprise that the Judgment makes no reference to *Mahamaya Debi* v. *Haridas Haldar* [8]. The sale of the office had been directed by a decree and so far as parties bound by that decree are concerned, the rule of inalienability cannot reasonably he held to prevail (cf. *Suppa Bhattar* v. *Suppu Sokkayya Bhattar*, [9] where *Lakshmanaswami* v. *Rangamma* [10] is doubted. As to the offerings, the right to share which was sold, being voluntary, we do not see that that circumstance bears on the question of alienability, if the offerings formed part of the emoluments of an office in a temple. (Cf. *Saripaka* v. *Mathura* [11].) The uncertainty of the 'income will not bring the case under S. 6 (*a*) of the Transfer of Property Act, for the "right" transferred is an existing right.. We find it difficult to agree with the interpretation placed by the learned Judges on the decision in *Dino Nath* v. *Pratap Chandra* [12]. In so far as reliance is placed on *Kashi Chandra* v. *Kailash Chandra* [13] we would point out that even Dino Nath's case (though

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1. (1886) I. L. R. 11. M. 234.
2. (1912) I. L. R. 36 M. 564.
3. (1914) 28 M. L. J. 251.
4. (1873) 12 B. L. R. 317 (P. C.)
5. (1893) I L. R. 17 M 282.
6. (1915) I. L. R. 37 A 545.
7. (1914) I. L. R. 38 M. 850
8. (1914) I. L. R. 42 C. 455.
9. (1915) 29 M. L. J. 558.
10. (1902, I. L. R. 26 M 31.
11. (1914) 26 M L. J. 482.
12. (1899) I L.R. 27 C. 30.
13. (1899) I. L. R. 26 C. 356

it attempts to distinguish it) is scarcely consistent with it and, as observed by the Madras High Court in *Bheemacharyulu* v. *Ramanujacharyulu* [1], the ground of the decision in that case is not 'altogether satisfactory.'

Rameswar Malla *v.* Sri Sri Jiu Thakur, I. L. R. 43 C. 34.

In view of the observation of the Privy Council in *Ishwar Shiam Chund* v. *Ram Kanai Ghose* [2], the learned Judges were of course justified in holding that Article 134, as amended, in the Limitation Act of 1908 would apply to *leases* as well. Their conclusion that a lease is an alienation 'for valuable consideration' even when no premium is paid, is in accord with the opinion expressed by *Sundara Iyer and Sadasiva Iyer, JJ.* in *Narasaya Udapa* v. *Venkataramana Bhatta* [3]. We are however unable to agree with the reason given by Fletcher, J. for holding that S. 30 of the Limitation Act did not apply to the case. It is not correct to say that the decisions of the Judicial Committee in *Abhiram Goswami's case* [4] and *Ishwar Shiam Chund's case* [5] 'show that no period of limitation was prescribed for a suit of the present nature under the Act of 1877.' It is well established that the scheme of the Indian Law of Limitation is that every suit is governed by some rule of limitation, the residuary article applying where there is no specific article to meet the case. All that the Privy Coumcil laid down in the cases mentioned was that Art. 134 of the Act of 1877 would not apply to the case of a lease. As pointed out in *Naraya* v. *Venkatramana* [6] Art. 142 or at any rate 144 would certainly have governed the case under the older Act and this, it seems to us, suffices to let in the operation of S. 30. It is of course a different question, whether, for the purpose of applying that section the present case is one in respect of which the period prescribed by the new act is *shorter* than that prescribed under the earlier Act. The number of years is the same i. e. 12 years, both under Art. 134 of the new Act and Art. 144 of the old Act. But there is a difference in the starting point, for possession may not always be adverse from the date of the alienation. See *Abhiram Goswami's Case*: cf. also *Muthuswamier* v. *Sri Methanithi Swamier*. [7] and it may accordingly turn out that in particular cases Art. 144 would have permitted a suit even after a date when it would have become barred if Art. 134 applied. It is by no means clear, whether this kind of difference is within the saving of S. 30.

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1. (1907) 17 M. L.J. 493.
2. (1911) I. L. R. 38 C. 526.
3. (1912) 23 M. L. J. 260.
4. (1909) I. L. R. 36 C. 1003.
5. (1911) I. L. R. 38 C. 526.
6. (1912) 23 M. L. J. 260.
7. (1913) I.L. R. 38 M. 356.